Supreme Court, U.S.
FILED
APR 10 2006
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(2)

No. 05-1101

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY W. OMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Ballard v. *United States*, 329 U.S. 187 (1946) 3
Chapman v. *California*, 386 U.S. 18 (1967) 2
Neder v. *United States*, 527 U.S. 1 (1999) 2, 3
Russell v. *United States*, 369 U.S. 749 (1962) 2
Stirone v. *United States*, 361 U.S. 212 (1960) 2
United States v. *Allen*, 406 F.3d 940 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005) 5
United States v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576 (6th Cir.), cert. denied, 537 U.S. 880 (2002) 6
United States v. *Cordoba-Murgas*, 422 F.3d 65 (2d Cir. 2005) 5
United States v. *Corporan-Cuevas*, 244 F.3d 199 (1st Cir.), cert. denied, 534 U.S. 880 (2001) 6
United States v. *Cotton*, 535 U.S. 625 (2002) 2, 3, 5
United States v. *Ford*, 872 F.2d 1231 (6th Cir. 1989) ... 5
United States v. *Higgs*, 353 F.3d 281 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004) 5, 6
United States v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988) 5
United States v. *Keller*, 916 F.2d 628 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991) 5
United States v. *Leichtnam*, 948 F.2d 370 (7th Cir. 1991) 5
United States v. *Mechanik*, 475 U.S. 66 (1986) 4

Cases—Continued: Page

United States v. *Nunez*, 180 F.3d 227 (5th Cir. 1999) 5
United States v. *Pickett*, 353 F.3d 62 (D.C. Cir. 2004) 5
United States v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001) 6
United States v. *Robinson*, 367 F.3d 278 (5th Cir.), cert. denied, 543 U.S. 1005 (2004) 6
United States v. *Spinner*, 180 F.3d 514 (3d Cir. 1999) 4
United States v. *Tran*, 234 F.3d 798 (2d Cir. 2000) 5
United States v. *Trennell*, 290 F.3d 881 (7th Cir.), cert. denied, 537 U.S. 1014 (2002) 6
United States v. *Yeo*, 739 F.2d 385 (8th Cir. 1984) 5
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 3

Constitution:

U.S. Const. Amend. V 2

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Unlike the respondent in *United States* v. *Resendiz-Ponce*, No. 05-998, respondent in this case contends that the question whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error does not warrant this Court's review. That contention lacks merit. As discussed in greater detail in the government's petitions in this case and in *Resendiz-Ponce*, the Ninth Circuit's rule that the omission of an offense element from a federal indictment necessitates automatic reversal conflicts with decisions from numerous other circuits and is inconsistent with this Court's decisions. For that reason, the petition in *Resendiz-Ponce* should be granted. Respondent offers no valid argument why the Court should grant plenary review in this case rather than (or in addition to) *Resendiz-Ponce*. Because this case is a less suitable

vehicle for resolution of the question on which the circuits are divided, but because the resolution of that question will have a bearing on the ultimate outcome of this case, the petition in this case should be held pending the disposition of *Resendiz-Ponce*.

1. Respondent first contends (Br. in Opp. 8-14) that the Ninth Circuit's rule is consistent with this Court's decisions. That contention is unsound.

a. Respondent primarily relies (Br. in Opp. 9-10) on this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Russell* v. *United States*, 369 U.S. 749 (1962). In *Stirone*, the Court held that a defendant was deprived of his Fifth Amendment right to indictment by grand jury when the government proved an element at trial in a way that departed from the way the element was alleged in the indictment. The Court declined to treat the deviation from the indictment as harmless error. 361 U.S. at 217. In *Russell*, the Court held that a defendant was similarly deprived of his right to indictment by grand jury when the indictment alleged the elements of the underlying offense, but was insufficiently specific with regard to one of the elements. The Court again refused to subject the error to harmless-error analysis. 369 U.S. at 770. Both *Stirone* and *Russell*, however, were decided before the Court definitively held, in *Chapman* v. *California*, 386 U.S. 18 (1967), that constitutional errors could be subject to harmless-error analysis. Moreover, neither *Stirone* nor *Russell* involved the *omission* of an offense element from the indictment. *Stirone* and *Russell* are thus inapposite here.

b. Respondent next attempts to distinguish (Br. in Opp. 11-13) this Court's more recent decisions in *Neder* v. *United States*, 527 U.S. 1 (1999), and *United States* v. *Cotton*, 535 U.S. 625 (2002). As to *Neder*, re-

spondent suggests only that the Court's holding is "inapplicable to a trial court's denial of a motion to dismiss a grand jury indictment which does not recite an essential element of the offense." Br. in Opp. 13. Respondent, however, provides no explanation why the omission of an offense element from the *indictment* should be immunized from harmless-error analysis when the omission of an offense element from the *jury's instructions* is not. If anything, for the reasons stated in the petition in *Resendiz-Ponce* (at 11-13), the type of omission at issue here constitutes a far *weaker* candidate for automatic reversal than the type of omission in *Neder*.

As to *Cotton*, respondent correctly notes (Br. in Opp. 11) that "the defendant failed to object to the sufficiency of the indictment prior to trial or even on the district court level." That fact, however, simply explains why the claim at issue was subject to plain-error, rather than harmless-error, review. And respondent does not dispute that the Court's holding in *Cotton*—that the omission of a sentence-enhancing fact from the indictment did not constitute reversible plain error because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, see 535 U.S. at 632-633—at a minimum strongly suggests that any such error is not structural either, in that a structural error is one that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. *Cotton* thus reinforces the conclusion that the omission of an offense element from a federal indictment is amenable to harmless-error analysis.

c. Respondent further notes (Br. in Opp. 13) that, in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), and *Ballard* v. *United States*, 329 U.S. 187 (1946), this Court held that

discrimination in the selection of grand jurors constitutes structural error. This Court, however, has not embraced the broader proposition that a court can never conduct harmless-error review by asking whether a grand jury would have found a particular fact. To the contrary, in *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court held that errors in grand-jury proceedings can be assessed for harmlessness, *id.* at 70—and distinguished *Vasquez* on the ground that it rested on the view that "discrimination in the selection of the grand jury is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary." *Id.* at 71 n.1. And the Court further held that, in evaluating whether an error at the grand-jury stage is in fact harmless, a reviewing court is not limited to considering the transcripts of grand-jury proceedings (as respondent suggests, see, *e.g.*, Br. in Opp. 10-11, 22), but may appropriately consider the entire record, including the petit jury's subsequent verdict. 475 U.S. at 70.

2. Respondent next contends (Br. in Opp. 16-24) that the Ninth Circuit's rule does not conflict with the decisions of other circuits. That contention, too, is mistaken.

a. Respondent claims (Br. in Opp. 16) that "[n]ine of the eleven other circuits have addressed whether a denial of a timely motion to dismiss a defective indictment is reversible error when grand jury transcripts are not available" and that "[a]ll nine circuits have unanimously concurred with the decision below." Only the Third Circuit, however, has unambiguously held that the omission of an offense element from a federal indictment requires automatic reversal. See *United States* v. *Spinner*, 180 F.3d 514, 515-516 (1999). In decisions cited by respondent (Br. in Opp. 17), the Second and Fourth Circuits

seemingly reached the same result. See *United States* v. *Tran*, 234 F.3d 798, 809 (2d Cir. 2000); *United States* v. *Hooker*, 841 F.2d 1225, 1231-1232 (4th Cir. 1988). Those decisions, however, relied on the proposition that a defective indictment deprives the convicting court of jurisdiction to enter judgment—a proposition that this Court subsequently rejected in *Cotton*, see 535 U.S. at 629-631, and a proposition that both circuits have since (either explicitly or implicitly) rejected as well, see *United States* v. *Cordoba-Murgas*, 422 F.3d 65, 71 n.6 (2d Cir. 2005); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004). Of the remaining six circuits discussed by respondent, the D.C. Circuit merely reserved the question, see *United States* v. *Pickett*, 353 F.3d 62, 68 (2004), and the cited decisions from the other five circuits all involve the discrete question whether, as in *Stirone*, there has been a *constructive amendment* of the indictment requiring automatic reversal. See, *e.g.*, *United States* v. *Nunez*, 180 F.3d 227, 230-232 (5th Cir. 1999); *United States* v. *Leichtnam*, 948 F.2d 370, 374-381 (7th Cir. 1991); *United States* v. *Keller*, 916 F.2d 628, 632-636 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991); *United States* v. *Ford*, 872 F.2d 1231, 1234-1237 (6th Cir. 1989); *United States* v. *Yeo*, 739 F.2d 385, 386-387 (8th Cir. 1984). Apart from *Spinner*, therefore, none of the decisions cited by respondent validly implicates the question presented here.

b. Respondent suggests (Br. in Opp. 20-23) that, apart from *United States* v. *Allen*, 406 F.3d 940 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005), all of the assertedly conflicting decisions of other circuits are distinguishable on the ground that they "address the validity of an indictment that has been

challenged for the first time after conviction or appeal" (Br. in Opp. 20). Were it true that those cases involved objections that had not been properly preserved before the trial court, those courts would have erred to the extent that they applied harmless-error, rather than plain-error, review. Contrary to respondent's assertions (*id.* at 20-21), however, in all but one of those cases, it is questionable whether the defendant *did* fail to preserve an objection below. In one case, the defendant actually filed a motion to dismiss the indictment. See *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 578 (6th Cir.), cert. denied, 537 U.S. 880 (2002). In another, the error was noted before trial began; although the defendant elected to proceed without a superseding indictment, he did file a post-verdict motion for a new trial, citing the indictment error. See *United States* v. *Trennell*, 290 F.3d 881, 884-885 (7th Cir.), cert. denied, 537 U.S. 1014 (2002). And in three others, the opinions of the courts of appeals are simply silent as to how the defendant preserved his objection. See *United States* v. *Robinson*, 367 F.3d 278 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *Higgs*, *supra*; *United States* v. *Corporan-Cuevas*, 244 F.3d 199 (1st Cir.), cert. denied, 534 U.S. 880 (2001). In the only case to the contrary, the defendant did not timely object in the district court, but the court of appeals ultimately concluded that that fact was irrelevant because harmless-error analysis was *always* applicable to the omission of an offense element from a federal indictment. See *United States* v. *Prentiss*, 256 F.3d 971, 983, 985 n.12 (10th Cir. 2001) (en banc). Because all of those decisions applied harmless-error analysis—and held that the omission of an offense element (or sentence-enhancing fact) does not constitute

structural error—they plainly conflict with the rule reaffirmed by the decision below.

3. Finally, respondent suggests (Br. in Opp. 24-25) that it would be inappropriate to hold this case pending the disposition of *Resendiz-Ponce* because the government engaged in "gamesmanship" by ensuring that the petition in this case was filed after the petition in *Resendiz-Ponce*. That allegation is entirely without merit. The panel in *Resendiz-Ponce* issued its decision on October 11, 2005, and the en banc court denied the petition for rehearing in this case on October 31, 2005 (20 days later). After the en banc court refused to grant rehearing on the question presented in this case, the government decided not to file what would surely have been a futile petition for rehearing en banc in *Resendiz-Ponce*, and instead filed a petition for certiorari in this Court on February 8, 2006—and filed its petition for certiorari in this case on February 28, 2006 (again, 20 days later).

More generally, respondent does not deny that *Resendiz-Ponce* constitutes a better vehicle for this Court's review, insofar as it presents the broader (and more frequently recurring) question whether the omission of an offense element from a federal indictment can be harmless, rather than the question whether the omission of an offense element *both* from the indictment *and* from the jury's instructions can be harmless. Nor does respondent dispute that the Court's answer to the former question will at least shed significant light on the correct answer to the latter. The appropriate disposition in this case is thus to hold the petition for *Resendiz-Ponce*.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *Resendiz-Ponce*, No. 05-998, and then disposed of accordingly.

Respectfully submitted.

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Solicitor General

APRIL 2006